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Supreme Court of the United States

October Term, 1948
No. 764

GULF OIL CORPORATION,
Petitioner,

against

M/V JOHN A. BROWN, Oriental Trade & Transport Company, Ltd.,
Claimant-Respondent.

(CONSOLIDATED CAUSE)

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

CHAUNCEY I. CLARK,
Counsel for Petitioner.

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(CONSOLIDATED CAUSE)

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Gulf Oil Corporation, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit, filed February 28, 1949, affirming a final decree in admiralty entered in the District Court for the Southern District of New York.

Jurisdiction

Jurisdiction is based on Section 240 (a) of the Judicial Code as amended, 28 U. S. Code 347.

The judgment of the Court of Appeals was entered February 28, 1949 (R. 327).

Opinions Below

The opinion of the District Court is printed at pages 284-99 of the record and is reported in 75 F. Supp. 935.

The opinion of the Court of Appeals is printed at pages 321-6 of the record and is not yet reported.

Summary Statement

This is a wartime convoy collision case in which petitioner's vessel GULFCOAST has been held solely at fault. Her fault is conceded. Your petitioner contends that steamship JOHN A. BROWN also was at fault and that her faults contributed to the collision; also that the opinions below present a new and dangerous concept of Articles 28 and 29 of the International Rules for Preventing Collisions at Sea—33 U. S. C. 113, 121. Those Rules are quoted in the Appendix to the annexed brief.

Facts

As did the Court of Appeals, petitioner accepts the District Court's findings of fact. They are:

On the evening of August 25, 1943, tank vessel GULFCOAST occupied station 72 astern of the Commodore in an eastbound Atlantic convoy and motorvessel JOHN A. BROWN occupied station 73 (R. 300-301). The convoy was made up in twelve columns, numbered from port, the distance between columns being 700 yards and between vessels in column 500 yards (R. 284, 286). The wind was N. W., force 3, sea moderate (R. 301). All vessels in the convoy were blacked out except for shaded blue stern lights that were

switched on as occasion required (R. 285-6). The convoy course was 82° true (R. 302). About 9:00 p. m., convoy time, visibility became poor due to drizzling rain (R. 301). No lookout was stationed on the bow of either GULFCOAST or JOHN A. BROWN (R. 301).

Shortly after 9:00 p. m., GULFCOAST veered to port toward the sixth column, thereafter turning to starboard and reducing speed by about two knots with the result that she dropped back to port of the BROWN, which was holding her approximate position in the seventh column (R. 301-2). Shortly before 10:00 p. m. the BROWN, observing that the vessels were on converging courses, reduced her speed to about eight knots but remained on automatic steering, with no one standing by the wheel (R. 301, 303).

Between 10:00 and 10:05 p. m. when collision was "in the making" the BROWN signaled to GULFCOAST by blinker: "What No", but GULFCOAST failed to identify herself (R. 302). GULFCOAST continued to angle to starboard and after danger of collision became imminent the BROWN's watch officer switched on her navigation lights, changed the gyro pilot from automatic to hand position, put the rudder hard right and called the master to the bridge (R. 302-4). The vessels then were *in extremis* (R. 304). The BROWN's master came to the bridge, took command and sounded a one-blast signal (R. 303). At 10:23 p. m. GULFCOAST's starboard bow collided with the BROWN's port side forward at an angle of about 30° and shortly thereafter the vessels' sterns came together (R. 284, 299).

Questions Presented

1. Can a vessel escape liability for a collision that has been in the making for twenty minutes, notwithstanding her watch officer alone has attempted to perform all the duties of the normal bridge complement and her failure to take any precautionary measures until the vessels were in extremis?

2. Is anything left of Article 28 of the International Rules if the whistle signal therein prescribed may be delayed two or three minutes even after danger of collision already has arisen?

3. Is wrongful delay in exhibiting navigation lights, by a vessel in convoy, a violation of Article 29 of the International Rules?

4. Are patently bad seamanship and neglect of ordinary precautions to be condoned more readily than technical violation of the Rules?

5. Is the decision below in conflict with the decisions of this Court as to (a) liability for faulty navigation; (b) whether a large vessel in crowded waters should have a lookout stationed on the bow; (c) the duty of a vessel to stop or stop and reverse her engines to avoid a converging vessel that has ignored signals?

Reasons Relied on for the Allowance of the Writ

1. The exoneration of the BROWN, notwithstanding her statutory fault in failing to sound the whistle signal required by Article 28 of the International Rules, is in conflict with this Court's decision in *The Pennsylvania,* 86 U. S. 125, 136.

2. Article 28 loses all efficacy if the required signal indicating an alteration of course may be delayed two or three minutes as held by the Court of Appeals (R. 321-4).

3. The ruling that, even though the BROWN ought to have turned on her lights earlier, "the fault is not a statutory one" and that the incidence of burden of proof is thus altered, presents a question that should be, and has not been, passed upon by this Court (R. 323-4).

4. The decision below is in conflict with the decision of this Court in *The Ottawa,* 3 Wall. 268, and numerous decisions in other Circuits requiring that a lookout be stationed on the bow when visibility is limited.

5. The Court of Appeals' ruling that it is proper "to make off at full speed to the right" to avoid a converging vessel whose course is uncertain, instead of stopping and reversing, conflicts with Article 29 of the Navigation Rules and with this Court's decision in *The New York,* 175 U. S. 187, 201.

6. With collision "in the making" for twenty minutes, there can be no excuse for the BROWN's deferring all precautionary measures until the vessels were *in extremis* as found by the District Court; nor was she "justified in sup-

posing" that GULFCOAST would keep out of the way as held by the Court of Appeals (R. 324).

WHEREFORE petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Court of Appeals for the Second Circuit commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named a full and complete transcript of the record and all proceedings in the consolidated cause numbered and entitled "No. 129—October Term, 1948, Oriental Trade & Transport Company, Limited, as owner of the motorvessel JOHN A. BROWN, libellant-appellee, against tank vessel GULFCOAST, Gulf Oil Corporation, claimant-appellant".

GULF OIL CORPORATION

By CHAUNCEY I. CLARK,
Attorney.

Dated: New York, N. Y., April 26, 1949.

Certificate

I hereby certify that I have examined the foregoing petition and in my opinion it is well founded and entitled to the favorable consideration of the Court, and that it is not filed for the purpose of delay.

CHAUNCEY I. CLARK,
Counsel.
27 William Street,
New York 5, N. Y.

New York, N. Y.
April 26, 1949.

Supreme Court of the United States

October Term, 1948

No.

GULF OIL CORPORATION,

Petitioner,

against

M/V JOHN A. BROWN, ORIENTAL TRADE & TRANSPORT COMPANY, LIMITED, Claimant,

Respondent.

(CONSOLIDATED CAUSE)

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

The facts, a summary of the case and the reasons relied on for the allowance of the writ are set forth in the foregoing petition.

ARGUMENT

I. The reasoning of the Court of Appeals with reference to the "Brown's" fault in failing to comply with Article 28 of the Navigation Rules defeats the purpose of that rule and conflicts with this Court's decisions.

The Court of Appeals made one significant supplementary finding of fact—that "at least a couple of minutes must have elapsed between the time Downer left and Mac-

Callum appeared" (R. 324). Downer was the Brown's watch officer, who testified:

> "I decided there was danger of collision so I turned on my navigation lights and put the gyro pilot into hand position and put the wheel hard astarboard and called the Master" (R. 106).

The whistle signal signifying "I am directing my course to starboard," made mandatory by Article 28 of the International Rules, quoted *in extenso* in the appendix hereto, was not sounded until after the master came on the bridge, made inquiries and was informed what had and what had not been done (R. 106). Accordingly, the Court of Appeals held the Brown guilty of a statutory fault in failing to sound a one-blast whistle signal at the time she put her rudder hard right (R. 321). However, the Court speculated that Gulfcoast's master would not have heard the signal had it been sounded two or three minutes earlier because he was in his room and that the watch officer probably would not have heard it because he did not hear it when it was sounded just before the collision (or had forgotten it in the ensuing excitement), and held:

> "It is indeed impossible to demonstrate beyond peradventure that such a signal could have had no effect upon the 'Gulfcoast's' movements; but we conceive that the burden is not so heavy as that. It does appear to us that the chance that she would have acted differently is too remote to count; and we hold that 'Brown' has shown that her fault did not contribute to the collision" (R. 323).

Those speculations are contrary to all the probabilties and the conclusions conflict with this Court's decisions that

to escape liability for violation of a navigation rule a vessel must prove that her violation "could not have been" a contributing cause of the collision. *The Pennsylvania,* 86 U. S. 125, 136; *Richelieu Nav. Co.* v. *Boston Ins. Co.,* 136 U. S. 408, 422; *Belden* v. *Chase,* 150 U. S. 674, 699; *Lie* v. *San Francisco & Portland S. S. Co.,* 243 U. S. 291, 298. Of those decisions we quote only *Belden* v. *Chase* where this Court said:

> "* * * And it is the settled rule in this court that when a vessel has committed a positive breach of statute, she must show not only that probably her fault did not contribute to the disaster, but that it could not have done so. *The Pennsylvania,* 19 Wall. 125, 136; *Richelieu Navigation Co.* v. *Boston Ins. Co.,* 136 U. S. 408, 422" (p. 699).

Under that rule "the chance that she (GULFCOAST) would have acted differently" had the BROWN complied with Article 28 makes it impossible for the BROWN to escape the consequences of her violation. In the past, the same Court has not hesitated to apply the rule, saying in *The San Simeon,* 63 F. (2d) 798 (C. C. A. 2):

> "It is indeed impossible to say that this would have changed the result, but the fault being a breach of a rule the COMMERCIAL MARINER must satisfy any doubts" (p. 801).

See also: *Yang-Tsze Ins. Ass'n.* v. *Furness, Withy & Co.,* 215 Fed. 859, 863 (C. C. A. 2), from which it appears that the rule established by this Court likewise is established in the English courts, and *General Seafoods Corp.* v. *J. S. Packard D. Co.,* 120 F. (2d) 117, 120 (C. C. A. 1)

where the Court said "the speculations as to what would have happened the law throws upon the vessel which fails in her duty".

A ship's whistle close aboard would be a sharp awakener and there is no reason to doubt that it would have prompted immediate avoiding manoeuvres.

II. As to the absence of a lookout on the "Brown's" bow, the decision of the Court of Appeals is in conflict with the decision of this Court in *The Ottawa*, 70 U. S. 268, and decisions in the First, Third and Fourth Circuits.

The Court of Appeals held:

> "It would be fatuous to the last degree to insist upon his (the lookout) being on the forecastle, where rain or sleet or even high winds in his face interfere with his vision" (R. 326).

That conflicts with all leading decisions on the precise question. In *The Ottawa*, 70 U. S. 268, this Court said:

> "Proper lookouts are competent persons other than the master and helmsman, properly stationed for that purpose, on the forward part of the vessel; * * *" (p. 273).

Decisions in the First, Third and Fourth Circuits are to the same effect. *Eastern Dredging Co.* v. *Winnisimmet Co.*, 162 Fed. 860, 861 (C. C. A. 1); *Dahlmer* v. *Bay State Dredging & Contracting Co.*, 26 F. (2d) 603, 605 (C. C. A. 1); *The Prinz Oskar*, 219 Fed. 483, 488 (C. C. A. 3); *The Cyrene*, 85 F. (2d) 935 (C. C. A. 4); *The Michigan*, 63 Fed. 280, 288 (C. C. A. 4).

A vessel in convoy, exhibiting no lights and surrounded by other blacked-out vessels, proceeding in a drizzling rain that limits visibility to about a quarter of a mile (R. 284) particularly needs a bow lookout, as stressed in *The Corozal*, 62 Fed. Supp. 123 (S. D. N. Y.) where the Court reviewed some of the above authorities and said:

> "The COROZAL had two lookouts—one on each wing of the bridge, but none in the bow. The failure to have a lookout in the forward part of the vessel is inexcusable when, as here, she was proceeding 'blacked out', at full speed in misty weather, and the safety of other vessels, as well as her own, depended largely upon the vigilance of proper lookouts" (p. 127).

In the instant case the Court has brushed aside all of that reasoning and put the "sheltering" of a lookout ahead of the safety of the entire venture (R. 326). To the BROWN's watch officer, attending to a multiplicity of duties and alone on the navigating bridge except for a man on the starboard wing whose view of GULFCOAST was obstructed, GULFCOAST's course well may have been "a mere matter of conjecture" as found by the District Court (R. 296). However, there was no need to leave it to conjecture as a lookout properly stationed on the bow could have made detailed reports, which presumably would have caused the BROWN's watch officer to take some avoiding action before the vessels were *in extremis*.

III. There should be no difference in the legal consequence of the "Brown's" "statutory fault" and her failure to exhibit lights earlier or to stop and reverse her engines, both in violation of Article 29.

The Court of Appeals correctly held that the BROWN "ought to have turned on her lights earlier" and that "it is a fault not to turn on the lights of a ship in the convoy when the time to take action has come" (R. 323-4).

Article 29 proscribes "any neglect to carry lights" (International Rules quoted in Appendix). The failure to exhibit lights at the proper time is a clear violation of that statute and we know of no decision to the contrary until the Court below said in this case:

> "Although it has been held—and we agree—that it is a fault not to turn on the lights of a ship in convoy when the time to take action has come, [*The Cushing*, 292 Fed. Rep. 560 (C. C. A. 2)] the fault is not a statutory one, and does not throw upon the delinquent ship the burden of proving that compliance with her duty would [not] have prevented collision" (R. 323-4).

Without attempting to differentiate between such faults and "statutory" faults, but relying entirely on the above legalistic distinction, the Court arrived at a conclusion opposite to the legal consequence of a statutory fault. That no such distinction exists appears from the decision of this Court in *The Ariadne*, 13 Wall. 475, 479.

The same is true of the BROWN's failure to stop or stop and reverse her engines as "required by the ordinary practice of seamen, or by the special circumstances of the case" (Article 29, quoted in the Appendix).

In *The New York*, 175 U. S. 187, this Court said:

> "Nothing is better settled than that, if a steamer be approaching another vessel which has disregarded her signals, or whose position or movements are uncertain, she is bound to stop until her course be ascertained with certainty [Cases]" (p. 201).

That language is peculiarly apt in the instant case in view of the findings that GULFCOAST had disregarded the BROWN's blinker signals and that the BROWN's watch officer was uncertain as to the position or movements of the GULFCOAST (R. 296). However, the Court's speculation that the BROWN's watch officer could not tell whether GULFCOAST "would pass ahead of him or astern" is contrary to the findings of fact and unwarranted by anything in the record (R. 325). GULFCOAST's stem struck the BROWN's port bow and it would have been impossible, under the findings of fact or from the BROWN's own testimony, for anyone to have considered that GULFCOAST might pass astern of the BROWN in order to regain station ahead of her (R. 291).

The BROWN's master and chief engineer testified that it would have taken not over half a minute to get the engines working astern (R. 94, 129). The effect of reversing her right-hand propeller would have been to pivot her stern to port (R. 130). As Lord Merriman said in *The Kaaparen* (1945) 78 Ll. L. 283:

> "* * * as is common knowledge, the best way to assist starboard wheel action with a right-handed propeller is to put the engines full astern" (p. 287).

It is no excuse that the BROWN's watch officer was alone in the wheel house with no one standing by the wheel or

the telegraph or to go and rouse the master (R. 83, 324). The ground on which she was excused by the Court below, namely that, "so far as he could tell in the darkness" continuing on at full speed—did not increase the chances that they would come together" is the antithesis of the well settled rule that a vessel should stop or stop and reverse her engines in the presence of danger (R. 325).

Of course, the precautions required of the BROWN under Article 29 were required to be taken seasonably instead of wating until it was too late to avoid collision; *The Teutonia*, 90 U. S. 77, 85. There was "no excuse in permitting the situation to become *in extremis*," *The Coamo*, 280 Fed. 282, 286 (C. C. A. 2). The BROWN's failure to take the obvious precaution of stopping and reversing engines may be accounted for but is not excused by the fact that her watch officer had "too many duties"; *The Orange*, 68 F. (2d) 307, 308 (C. C. A. 2).

Article 29 of the International Rules ceases to have any significance if the Court of Appeals was right in saying the BROWN was "justified in supposing" that GULFCOAST would keep out of the way, nothwithstanding her course was uncertain and she had ignored the BROWN's blinker signals (R. 296, 324).

Conclusion

For the reasons stated in the petition and in this brief, it is respectfully submitted that the writ of certiorari should be granted.

CHAUNCEY I. CLARK,
Counsel for Petitioner.

Dated: New York, N. Y., April 26, 1949

APPENDIX

The pertinent regulations for preventing collisions at sea, known throughout the world as the International Rules, enacted August 19, 1890, 26 Stat. 328, 33 U. S. C. 113, 121, are as follows:

> "*Art. 28.* The words 'short blast' used in this article shall mean a blast of about one second's duration.
>
> When vessels are in sight of one another, a steam vessel under way, in taking any course authorized or required by these rules, shall indicate that course by the following signals on her whistle or siren, namely:
>
> One short blast to mean, 'I am directing my course to starboard.'
>
> Two short blasts to mean, 'I am directing my course to port.'
>
> Three short blasts to mean, 'My engines are going at full speed astern.'
>
> *Art. 29.* Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper look-out, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case."

A rule identical with the above Article 29 is included in the Inland Rules (33 U. S. C. 293).

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Claimant-Respondent.

CONSOLIDATED CAUSE

BRIEF OF CLAIMANT-RESPONDENT, ORIENTAL TRADE & TRANSPORT COMPANY, LIMITED, IN OPPOSITION TO THE PETITION

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Bowne & Co., Inc., 163 Front Street, New York 7

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M/V "JOHN A. BROWN," ORIENTAL TRADE & TRANSPORT COMPANY, LIMITED,
Claimant-Respondent.

BRIEF OF CLAIMANT-RESPONDENT, ORIENTAL TRADE & TRANSPORT COMPANY, LIMITED, IN OPPOSITION TO THE PETITION

The Facts.

The facts set forth in the petition, page 2, do not fully disclose the circumstances of the collision as a result of which these cases arose. They are fully stated in the findings made in the Trial Court (R. 300-309) and in the opinion of that Court (R. 284-290) which were accepted as correct by the Court of Appeals in its opinion (R. 320). We feel it necessary to restate the facts in order to supply material ones omitted in petitioner's brief.

Between 9:00 and 10:00 p. m. on the night of the collision the *Gulfcoast,* No. 72 in the convoy, failed to keep in line behind the commodore ship, No. 71, but tended to veer toward column 6 on her port hand, and got sufficiently out of line so that it became necessary for her to veer to

her own starboard so as to resume her station in column 7 which was her proper column. She reduced her speed about two knots with the result that she dropped back on the port side of the *Brown* which was approximately holding her correct position in column 7 (R. 301, 302).

At 9:00 p. m. the visibility was only about one-quarter of a mile due to a drizzling rain which had set in, and when the *Gulfcoast* got out of her proper station in the convoy the *Brown* lost sight of her. Between 9:30 and 10:00 p. m. the *Brown* observed a vessel 2 to 2½ points on her port bow, the identity of which was unknown to anyone on board the *Brown* but which later turned out to be the *Gulfcoast,* and which was falling back to a position abeam of the *Brown.* When that occurred, between 10:00 and 10:05 p. m., the *Brown* flashed, by use of an electric torch, by Morse code the inquiry "What No?", the purpose being to learn the convoy number, if any, of the vessel so observed (R. 302).

No answer was given to the inquiry but there was a flash from the *Gulfcoast* which indicated that the *Brown's* signal had been observed (R. 302).

Not knowing that the unknown vessel was the *Gulfcoast,* the *Brown* nevertheless kept her under observation and seeing that she was converging toward the *Brown's* course the *Brown* reduced her own revolutions just prior to 10:00 o'clock (R. 302).

The *Gulfcoast* continued to angle toward her own starboard and when the *Brown's* deck officer observed a considerably sharper angle he recognized there was danger of collision, turned on the *Brown's* lights, which at once showed and were observed on the *Gulfcoast* (R. 302), but it was not until the angle of the *Gulfcoast* to her own starboard materially increased that danger of collision arose (R. 106, 113). As soon as her running lights were displayed, the *Brown's* gyro pilot was put in a hand posi-

tion, her rudder placed hard right, and the master was called to the bridge and took command (R. 303).

The master ordered a one-whistle signal, which was blown and heard on the *Gulfcoast,* but the latter, notwithstanding, continued on her course, blew no whistle, showed no lights, made no effective change in her helm until too late, and struck the *Brown* (R. 303).

Argument.

The petitioner bases its petition for certiorari on three grounds. Each is insufficient and concerns solely questions of fact which have been resolved by two Courts against the petitioner.

Assuming that the *Brown's* one-whistle signal was not in strict compliance with Article 28 of the International Rules, the lapse of time between the initiation of the *Brown's* starboard turn and the blowing of the one-blast whistle signal in no way contributed to the collision. Whether it did or did not so contribute is manifestly a question of fact and the Trial Court (R. 304) and the Court of Appeals (R. 322) both agreed that it did not and could not have contributed to the collision.

Article 28 of the International Rules requires that a vessel shall indicate a direction of course to her own starboard by sounding a signal of one blast. Obviously the purpose of the Rule is to advise the other vessel in what direction the vessel which is sounding the whistle is going to go. There is nothing in the Rule to indicate that its purpose is to serve as an alarm signal or to advise the other vessel that the one blowing the whistle is there at all. As was stated by the Trial Court, the complaint of the *Brown's* navigation made by the master of the *Gulfcoast* was *not* that the collision occurred as a result of the *Brown's* turn to the right but, as he alleged, because of a later turn which was abruptly to the *Brown's* own *port*

and across the course of the *Gulfcoast* (R. 297), a turn which the evidence established and both Courts found the *Brown* never took.

The petitioner seems to argue that the rule in *The Pennsylvania,* 19 Wall. 125, 136, makes it impossible for a vessel which has committed a statutory fault ever to be relieved from liability, but that is not the effect of *The Pennsylvania* decision. As the Court of Appeals said in *The Aakre,* 122 Fed. (2d) 469 (C. C. A. 2) at p. 474:

> "Indeed, however The Pennsylvania rule was originally stated, the history of its application shows that it has done no more than shift the burden of proof with regard to causality. That was all that was necessary to the decision of The Pennsylvania case itself, to the Richelieu case, supra, and to The Martello, 153 U. S. 64, 74, 14 S. Ct. 723, 38 L. Ed. 637, and Lie v. San Francisco & P. S. S. Co., 243 U. S. 291, 298, 37 S. Ct. 270, 61 L. Ed. 726. It seems to have been disregarded altogether in White Oak Transportation Co. v. Boston, Cape Cod & New York Canal Co., 258 U. S. 341, 344, 42 S. Ct. 338, 66 L. Ed. 649, and was assumed to have done no more than shift the burden in Henry DuBois Sons Co. v A/S Ivarans Rederi, 2 Cir., 116 F. 2d 492, certiorari denied. The Ariosa v. A/S Ivarans Rederi, 61 S. Ct. 942, 85 L. Ed.—."

This Court has held that an omission to comply with the rules of navigation where it clearly appears that it had nothing to do with the disaster is not sufficient to exonerate the culpable party from any portion of the damages. *The City of Washington,* 92 U. S. (2 Otto) 31.

The decision of the Court of Appeals in this case is in no way in conflict with The Pennsylvania rule. It is merely an application of the rule and a finding of fact that the violation of Article 28 of the International Rules had no causal connection with the collision.

There is no substance to the second contention of the petitioner that the decision in this case that absence of a lookout on the *Brown's* bow was not a fault conflicts with decisions of this Court and of other Courts of Appeal.

The evidence was unanimous from the witnesses on both ships, the men who were there and knew the conditions that because of the drizzling rain and spray from the sea a lookout on the bow could not have kept an effective watch and that a better watch could have been kept from the bridge, and the Judges of two Courts have accepted this testimony from these witnesses, including the master of the *Gulfcoast* (R. 295, 324). No one except counsel for petitioner has argued that in this case it was a fault not to have a lookout on the bow.

But even if it were a fault, such fault had nothing to do with the collision because each vessel was aware of the presence and apparent heading of the other for a full fifteen minutes before the collision (R. 294). There are many decisions both in this Court and in the lower Courts which have exonerated vessels though they had no lookout at all. This Court said in *The Blue Jacket,* 144 U. S. 371:

> "It is well settled that the absence of a lookout is not material where the presence of one would not have availed to prevent a collision."

Lind v. *United States,* 156 Fed. (2d) 231 (C. C. A. 2); *The Mamei,* 152 Fed. (2d) 924, 929 (C. C. A. 3); *The Minerva,* 58 Fed. Supp. 884, 890, affirmed per curiam 156 Fed. (2d) 61 (C. C. A. 3); *Harbor Oil Transport Co. of Conn.* v. *The Plattsburgh Socony,* 151 Fed. (2d) 708, 709 (C. C. A. 2); *Rice* v. *United States,* 168 Fed. (2d) 219, 220 (C. C. A. 2); *Puratich* v. *United States,* 126 Fed. (2d) 914 (C. C. A. 9); *The George Dumois,* 153 Fed. 833 (C. C. A. 4); *The Virginia and Joan,* 13 Fed. Supp. 419, affirmed 86 Fed. (2d) 259 (C. C. A. 1).

The decision of this Court in *The Ottawa* (3 Wall. 268) is not analogous for there the steamship had no lookout at all except the master and there was some doubt that even he was on deck. The schooner with which the steamer collided was not seen in time. In *The Corozal*, 62 Fed. Supp. 123, there was no lookout at all when the other ship was first sighted. If she had been sighted sooner the collision might have been avoided.

In the case at bar the *Brown* not only had three men on lookout besides the Third Mate on watch (R. 301), but the Third Mate had seen the *Gulfcoast* himself a good one-half hour before the collision and had signaled to her then (R. 302, 112).

As to petitioner's third contention, it is in error in asserting that the Court of Appeals held that the *Brown* should have turned her lights on earlier. The Court of Appeals said that it is a fault not to turn on the lights of a ship in convoy when the time to take action has come but it did not hold that such time had come in this case before the lights actually were turned on. What that Court said was:

> "It is very doubtful whether the time for action had arrived before the lights were in fact turned on. The ships had already been in communication, and the *Brown* was justified in supposing that the *Gulfcoast* had made her out and would keep out of her way; for the *Brown* was in her column and the *Gulfcoast* was not. Besides, it must be remembered that to light up even a single ship may expose a whole convoy to attack, for lights can be seen afar off; and a master's decision must always be the choice between that danger and the danger of any further delay in disclosing the position of a ship" (R. 323).

Both Courts below held that the lights were turned on sufficiently soon amply to advise the *Gulfcoast* of the

Brown's position and movements so far as lights would do so and gave her every chance to act (R. 304, 323). As the Court of Appeals said (R. 323), the *Gulfcoast* did nothing because she thought that nothing was enough.

As far as the fact that the *Brown* turned to her right to avoid collision instead of stopping and reversing is concerned, the situation when this action was taken was an emergency, and the cases are legion where failure to reverse has been excused in such an emergency. *The Blue Jacket*, 144 U. S. 371; *The Bylayl*, 49 Fed. Supp. 439, affirmed 139 Fed. (2d) 348 (C. C. A. 1); *The Gulf Star*, 136 Fed. (2d) 461, 465 (C. C. A. 2); *City of New York* v. *American Export Lines*, 131 Fed. (2d) 902, 905 (C. C. A. 2).

The questions raised by the petitioner are disputed questions of fact decided against the petitioner and are not properly a subject for review by this Court.

CONCLUSION.

The petition for certiorari should be denied.

Respectfully submitted,

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